No. 2383

United States
Circuit Court of Appeals
For the Ninth Circuit.

SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation, Claimant of the American Steamship "BEAVER," Her Engines, etc.,

Appellant,

vs.

PORTLAND AND ASIATIC STEAMSHIP COMPANY, a Corporation,

Appellee.

Apostles.

Upon Appeal from the United States District Court for the Northern District of California, First Division.

FILED
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FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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In the District Court of the United States, in and for the Northern District of California, First Division.

No. 15,130.

PORTLAND & ASIATIC STEAMSHIP COMPANY, a Corporation,

Libelant,

vs.

SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY, a Corporation,

Respondent.

Praecipe for Apostles on Appeal.

To the Clerk of the Above-entitled Court:

Please prepare transcript of record in this case on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and include in said transcript the following:

I.

Statement required by Admiralty Rule IV, Subdivision I of said *Circuit of* Appeals.

II.

The stipulation permitting use of record in the case of Lie vs. Beaver, filed February 5th, 1914.

III.

The final decree and the notice of appeal.

IV.

The Assignment of Errors.

V.

This Praecipe.

Dated: February 9th, 1914.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
DENMAN & ARNOLD,
Proctors for Respondent and Appellant. [2*]

[Endorsed]: Filed Feb. 10, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [3]

Statement of Clerk U. S. District Court.

In the District Court of the United States, in and for the Northern District of California, First Division.

No. 15,130.

PORTLAND AND ASIATIC STEAMSHIP COMPANY, a Corporation,

Libelant,

vs.

SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation,

Respondent.

PARTIES.

LIBELANT: The Portland and Asiatic Steamship Company, a Corporation.

RESPONDENT: The San Francisco and Portland Steamship Company, a Corporation. [4]

*Page number appearing at foot of page of original certified Record.

PROCTORS.

For LIBELANT: Messrs E. B. McClanahan and S. H. Derby, San Francisco, California.

For RESPONDENT: Messrs. William Denman and G. S. Arnold, and Messrs. McCutchen, Olney and Willard (Ira A. Campbell, Esquire, representing the firm of McCutchen, Olney and Willard), all of San Francisco, California.

PROCEEDINGS.

1911.

March 30. Filed Libel for damages, etc.

Issued Citation for the appearance of Respondents, and which said Citation was afterwards returned and filed on March 30th, 1911, with the return of the United States Marshal for the Northern District of California, endorsed thereon as follows:

"I have served this Writ personally by copy on San Francisco and Portland Steamship Company, a corporation, by handing to and leaving a copy hereof with A. J. Frey, who is the person designated by the said San Francisco and Portland Steamship Company, a corporation, under the statutes of the State of California, as the person upon whom all legal process shall be served [5] in matters affecting the said San Francisco and Portland Steamship

Company, a corporation, in the State of California, this 30th day of March, 1911, in the City and County of San Francisco, in the State and Northern District of California.

C. T. ELLIOTT,
U. S. Marshal.
By B. F. Towle,
Office Deputy Marshal."

May 12. An order was this day entered by the District Court of the United States for the Northern District of California, that the above-entitled cause and the cause entitled Olaf Lie, Master of the Norwegian Steamship "Selja," etc., vs. The American Steamship "Beaver," etc., and numbered 15,099, be consolidated for trial, etc. (copy of said order is embodied in this Transcript).

Under said Order of Reference all entries as to hearings, references to Commissioners, etc., are entered in the latter cause, and no other reference thereto is herein made, as per the instructions of Proctors for Appellant, herein.

May 17. Filed Answer of Respondent to the Libel herein.

1912.

April 23. Filed Stipulation as to Amending Original Libel herein.

23. Filed Amendment to Libel.

1913.

December 5. Filed Final Decree.

1914.

February 5. Filed Notice of Appeal.

February 10. Filed Assignment of Errors. [6]

At a stated term of the District Court of the United States for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 12th day of May, in the year of our Lord one thousand nine hundred and eleven. Present: The Honorable JOHN J. DE HAVEN, Judge.

#15,099.

OLAF LIE, Master, etc.

vs.

The American Str. "BEAVER," etc.

#15,130.

PORTLAND & ASIATIC STEAMSHIP COMPANY

vs.

SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY.

Order Consolidating Causes [and Referring Same to U. S. Commissioner to Take Evidence, etc.].

The motion to consolidate these causes for trial

and for an order of reference, this day came on for hearing and after hearing E. B. McClanahan, Esqr., in behalf of said motion and other proctors in opposition thereto, by the Court ordered that said cause be, and they are hereby consolidated for trial, and said causes as consolidated be, and they are hereby referred to Jas. P. Brown, United States Commissioner, to take the evidence to be offered by the respective parties and to report the same to the Court within thirty days from this date. [7]

In the District Court of the United States, in and for the Northern District of California, First Division.

No. 15,130.

PORTLAND AND ASIATIC STEAMSHIP COMPANY,

Libelant,

vs.

SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY,

Respondent.

Final Decree.

The above cause having come duly on to be heard on the pleadings and proofs of the respective parties, and the same having been argued and submitted, and an opinion having been filed herein on the 25th day of November, 1913, finding that libelant is entitled to damages from respondent in the sum of $13,951.26, together with interest thereon at the rate of six per

cent per annum from November 22d, 1910; now, therefore

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said libelant do have and recover of the San Francisco and Portland Steamship Company, respondent herein, the sum of Thirteen Thousand Nine Hundred and Fifty-one and 26/100 Dollars ($13,951.26), together with interest thereon at the rate of six per cent per annum from November 22d, 1910, to date, amounting to the sum of Two Thousand Five Hundred and Thirty-four and 36/100 Dollars ($2,534.36), making a total of Sixteen Thousand Four Hundred and Eighty-five and 72/100 Dollars ($16,485.72), and that said respondent pay to said libelant the said sum of Sixteen Thousand Four Hundred and Eighty-five and 72/100 Dollars ($16,-485.72), together with interest thereon at the rate [8] of six per cent per annum from the date of this decree until the same is satisfied, together with costs to be taxed herein.

Dated: December 2d, 1913.

R. S. BEAN,

Judge (by Assignment) of the United States District Court for the Northern District of California.

O. K. as to form.

McCUTCHEN, OLNEY & WILLARD.

[Endorsed]: Filed Dec. 5, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [9]

In the District Court of the United States, in and for the Northern District of California, First Division.

No. 15,130.

PORTLAND AND ASIATIC STEAMSHIP COMPANY,

Libelant,

vs.

SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY,

Respondent.

Notice of Appeal.

To the Clerk of the Above-entitled Court, and to the Libellant, and Messrs. McClanahan & Derby, Its Proctors:

You and each of you will please hereby take notice that the San Francisco and Portland Steamship Company, a corporation, claimant and respondent herein, hereby appeals from the final decree made and entered herein on the 5th day of December, 1913, to the next United States Circuit Court of Appeals for the Ninth Circuit, to be holden in and for said Circuit, at the City and County of San Francisco.

Dated, February 5th, 1914.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
DENMAN & ARNOLD,

Proctors for Claimant and Appellant. **[10]**

Service of the within Notice of Appeal and receipt

of a copy is hereby admitted this 5th day of February, 1914.

McCLANAHAN & DERBY,
Proctors for Libelant.

[Endorsed]: Filed Feb. 5, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [11]

In the District Court of the United States, in and for the Northern District of California, First Division.

No. 15,130.

PORTLAND & ASIATIC STEAMSHIP COMPANY, a Corporation,

Libelant,

vs.

SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY, a Corporation,

Respondent.

Assignment of Errors.

Now comes San Francisco & Portland Steamship Company, a corporation, owner of the American steamship "Beaver," her engines, etc., claimant, respondent and appellant herein and says:

That in the record, opinions, decisions, interlocutory and final decrees and proceedings in said cause, there is manifest and material error, and said appellant now makes and files and presents the following Assignment of Errors on which it relies, to wit:

I.

That the District Court erred in holding and de-

creeing that libelant was entitled to recover from claimant and respondent, as set forth in the decree filed herein on the 5th day of December, 1913.

II.

That the District Court erred in holding and decreeing that libelant was entitled to recover damages in full for the loss of bill of lading freight, bunker coal, flour slings, house flag, dunnage mats and wood.

III.

That the District Court erred in holding and decreeing that libelant was entitled to recover damages in full, without any offset [12] whatever.

IV.

That the District Court erred in not holding and decreeing that the damages occasioned by the collision, should be divided.

V.

That the District Court erred in not holding that the libelant herein was in the same position with reference to damages occasioned by the collision as the owners of the "Selja."

VI.

That the District Court erred in holding that libelant was entitled to a judgment for its costs and in not holding that said costs should be divided.

Dated: February 9th, 1914.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
DENMAN & ARNOLD,
Proctors for Respondent and Appellant. [13]

Service of the within Assignment of Errors and

receipt of a copy is hereby admitted this 9th day of February, 1914.

McCLANAHAN & DERBY,
Proctors for Libelant.

[Endorsed]: Filed Feb. 10, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [14]

In the District Court of the United States, in and for the Northern District of California, First Division.

No. 15,130.

PORTLAND AND ASIATIC STEAMSHIP COMPANY,

Libelant,

vs.

SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY,

Respondent.

Stipulation Permitting Use of Record on Appeal.

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the appeal of the claimant and respondent herein may be heard and determined upon the record on file in the United States Circuit Court of Appeals for the Ninth Circuit in the case of Olaf Lie, Master of the Norwegian Steamship "Selja," vs. San Francisco and Portland Steamship Company, a Corporation, Claimant of the American Steamship "Beaver," and numbered therein 2365.

It is further stipulated that a supplemental record

of the proceedings in the case numbered 15,130 of the records in the United States District Court for the Northern District of California, First Division, may be prepared and filed in the said United States Circuit Court of Appeals and that said appeal may be placed upon the calendar of said Court for argument on the day designated for hearing the appeal in said case numbered 2365, to wit: March 9th, 1914.

McCLANAHAN & DERBY,

Proctors for Libelant.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

DENMAN & ARNOLD,

Proctors for Claimant and Respondent.

[Endorsed]: Filed Feb. 5, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. **[15]**

Certificate of Clerk U. S. District Court to Apostles on Appeal.

United States of America,

Northern District of California,—ss.

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of California, do hereby certify the foregoing and hereunto annexed (14) fourteen pages, numbered from 1 to 14, inclusive, contain a full, true and correct copy of certain documents and records as the same now appear on file and of record in the clerk's office of said District Court, in the cause entitled Portland & Asiatic Steamship Company, a Corporation, Libelant, vs. San Francisco & Portland Steamship Company, a Corporation, Respondent, numbered 15,130.

Said Transcript is made up pursuant to and in accordance with the "Praecipe for Apostles on Appeal" (copy of which is embodied herein), and the instructions of Messrs. McCutchen, Olney & Willard and Ira A. Campbell et al., Proctors for Respondent and Libelant herein.

I further certify that the costs for preparing and certifying the foregoing Transcript on Appeal is the sum of $4.90, and that the same has been paid to me by the proctors for appellants herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 24th day of February, A. D. 1914.

[Seal] W. B. MALING,

Clerk.

By Lyle S. Morris,

Deputy Clerk. **[16]**

[Endorsed]: No. 2383. United States Circuit Court of Appeals for the Ninth Circuit. San Francisco and Portland Steamship Company, a Corporation, Claimant of the American Steamship "Beaver," Her Engines, Etc., Appellant, vs. Portland and Asiatic Steamship Company, a Corporation, Appellee. Apostles. Upon Appeal from the United States District Court for the Northern District of California, First Division.

Received and filed February 24, 1914.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,

Deputy Clerk.

[Stipulation That Appeal Herein may be Heard and Determined on Record in Olaf Lie vs. S. F. & Portland S. S. Co., No. 2365, etc.]

In the United States Circuit Court of Appeals for the Ninth Circuit.

SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY,

Appellant,

vs.

PORTLAND AND ASIATIC STEAMSHIP COMPANY,

Appellee.

STIPULATION PERMITTING USE OF RECORD ON APPEAL.

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the appeal of the claimant and appellant herein may be heard and determined upon the record on file in the United States Circuit Court of Appeals for the Ninth Circuit in the case of Olaf Lie, Master of the Norwegian Steamship "Selja," vs. San Francisco and Portland Steamship Company, a Corporation, Claimant, of the American Steamship "Beaver," and numbered therein 2365.

It is further stipulated that a supplemental record of the proceedings in the case numbered 15,130 of the records in the United States District Court for the Northern District of California, First Division, may be prepared and filed in the said United States Circuit Court of Appeals and that said appeal may

be placed upon the calendar of said Court for argument on the day designated for hearing the appeal in said case numbered 2365, to wit: March 9th, 1914.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
DENMAN & ARNOLD,
Appellant.
E. B. McCLANAHAN,
S. H. DERBY,
Appellee.

[Endorsed]: No. 2383. United States Circuit Court of Appeals, for the Ninth Circuit. San Francisco and Portland Steamship Company, Appellant, vs. Portland and Asiatic Steamship Company, Appellee. Stipulation Permitting Use of Record on Appeal. Filed Feb. 24, 1914. F. D. Monckton, Clerk.

At a stated term, to wit, the October Term, A. D. 1913, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Tuesday, the twenty-fourth day of February, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable WILLIAM B. GILBERT, Circuit Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable FRANK S. DIETRICH, District Judge.

No. 2383.

SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation, Claimant of the American Steamship "BEAVER," Her Engines, etc.,

Appellant,

vs.

PORTLAND AND ASIATIC STEAMSHIP COMPANY, a Corporation,

Appellee.

Order Allowing Appeal to be Heard and Determined on Record in Olaf Lie vs. S. F. & Portland S. S. Co., No. 2365, Allowing Supplemental Record to be Filed, and Assigning Cause for Argument on March 9, 1914.

Pursuant to the stipulation of counsel, this day filed therefor, it is ORDERED that the appeal in the above-entitled cause may be heard and determined upon the record on file in this court in the cause entitled Olaf Lie, Master of the Norwegian Steamship "Selja," etc., Appellant, vs. San Francisco & Portland Steamship Company, a Corporation, Claimant of the American Steamship "Beaver," Her Engines, etc., No. 2365; and that a Supplemental Record of the proceedings had in the first above-entitled cause (No. 15,130 in the court below), may be prepared and filed in this court, and that the appeal herein may be placed upon the calendar of this court for argument on March 9, 1914, the day on which the appeal in the foregoing entitled cause of Olaf Lie, Master, etc., vs. San Francisco & Portland Steamship Co., Claimant, etc., No. 2365, is set for argument.

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No. 2383

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

San Francisco and Portland Steamship Company (a corporation), claimant of the American Steamship "Beaver", her engines, etc.,

Appellant,

vs.

Portland and Asiatic Steamship Company (a corporation),

Appellee.

BRIEF OF APPELLANT.

Statement of the Case.

On the 22nd day of November, 1910, the American Steamship "Beaver", owned by appellant, while proceeding on a voyage from San Francisco to Portland, ran into and sank the Norwegian Steamship "Selja", at a point in the vicinity of Point Reyes, California, and, as a result of the collision, the "Selja", together with all of her equipment and cargo, became a total loss. The question of liability for the loss of the "Selja" is now pending before this Court, in cause No. 2365, on an

appeal from the decision of District Judge Bean, sitting by assignment as judge of the United States District Court, for the Northern District of California, in which the Court held the "Selja" to be in fault. Inasmuch as the fault of the "Beaver" was admitted, the damages, so far as concerned the two vessels, were accordingly divided under the rule of cross liability.

The libel in this cause was filed against the "Beaver" by appellee, as the time charterer of the "Selja", for damages suffered by appellee, as such charterer, through loss of its bill of lading freight on the "Selja's" cargo, and for the value of the bunker coal, flour slings, house flag and dunnage wood and mats, belonging to appellee, which went down with the "Selja". The cause was consolidated for trial with the libel brought against the "Beaver" by Olaf Lie, master of the "Selja", on behalf of himself and the owners, officers and crew of said steamship, being Cause No. 15099 in the District Court, and Cause No. 2365 now pending in this Court. Following the hearing of said cause, Judge Bean rendered his decision, holding the "Selja" mutually in fault with the "Beaver". Thereafter separate decrees were entered in the consolidated actions.

In the present action the Court held that the appellee had a right of full recovery, unaffected by said cross liability, against appellant, as claimant of the "Beaver", for said bill of lading freight, and said bunker coal, flour slings, house flag and dunnage wood and mats. Final decree was accordingly entered awarding appellee the sum of $13,951.26, with interest thereon at the rate of 6% per annum from November 22, 1910, to date of

entry, amounting to $2,534.36, or a total award of $16,485.72 (Apostles pp. 6-7). Of said sum of $13,951.26, $10,742.21 was on account of the bill of lading freight, and $3,209.05 as the value of the bunker coal, flour sling, house flag and dunnage wood and mats. The correctness of the amount of damages is admitted, and this appeal involves alone the question of liability therefor.

It is admitted that on February 1, 1909, the owner of the "Selja" chartered her to appellee for a period of three years, under a charterparty which was not a demise of the vessel, but a contract of affreightment for the carriage of merchandise and livestock and passengers; that appellee procured to be shipped on board the "Selja" various goods, wares and merchandise, and gave bills of lading therefor on which the total freight which would have been collected by appellee upon delivery of the goods, less certain expenses in earning said freight saved by the collision, would have amounted to the aforesaid sum of $10,742.21.

It is further admitted that bunker coal was furnished the "Selja" for steaming purposes by appellee under the requirements of the charterparty, and that the flour slings were furnished the vessel by appellee for loading and discharging the cargo, and the dunnage woods and mats for properly stowing the same.

The question presented by this appeal is whether appellee is entitled to a full recovery for the loss of said bill of lading freight and the value of said bunker coal, etc., or whether, as such charterer, it is affected by the fault of the "Selja" and only entitled to recover subject to the rule of cross liability, by reason of such fault.

Appellant contends that the damages suffered by appellee should have been divided, and that appellant should be entitled to offset against the moiety recoverable by appellee, one-half of the damages awarded the owners of the cargo against appellant, in that certain cause in the District Court No. 15099, also consolidated for trial with the cause herein referred to.

Inasmuch as the amount awarded the owners of the cargo against appellee was more than twice the damages suffered by the owner of the "Selja" and appellee, appellee will recover nothing if appellant's contention is upheld and the rule of cross liability is applied in this action.

Specifications of Error.

Errors have been assigned, in the Apostles on Appeal, to the decree of the District Court, as follows:

I.

That the District Court erred in holding and decreeing that libelant was entitled to recover from claimant and respondent, as set forth in the decree filed herein on the 5th day of December, 1913.

II.

That the District Court erred in holding and decreeing that libelant was entitled to recover damages in full for the loss of bill of lading freight, bunker coal, flour slings, house flag, dunnage mats and wood.

III.

That the District Court erred in holding and decreeing that libelant was entitled to recover damages in full, without any offset whatever.

IV.

That the District Court erred in not holding and decreeing that the damages occasioned by the collision, should be divided.

V.

That the District Court erred in not holding that the libelant herein was in the same position with reference to damages occasioned by the collision as the owners of the "Selja".

VI.

That the District Court erred in holding that libelant was entitled to a judgment for its costs and in not holding that said costs should be divided.

Argument.

I.

THE "SELJA" WAS MUTUALLY IN FAULT WITH THE "BEAVER".

By stipulation of the parties hereto and by order of this Court entered pursuant to such stipulation, this appeal is to be heard and determined upon the record on file in this Court in the cause entitled, Olaf Lie, Master of the Norwegian Steamship "Selja", etc., Appellant, v. San Francisco and Portland Steamship Com-

pany, a corporation, claimant of the American Steamship "Beaver", her engines, etc., No. 2365.

Inasmuch as the question of the fault of the "Selja" has been fully presented both on argument and by briefs in said Cause No. 2365, by the same proctors who appear for the respective parties to this appeal, we shall not reiterate at length the contentions presented by appellant, appellee in Cause No. 2365, as to the "Selja's" mutual fault for said collision. We respectfully submit, however, that on the record, briefs and arguments in said Cause No. 2365, the fault of the "Selja" for said collision is clearly established, and that it should be so found in this cause, and the decision of the District Court upheld in that respect.

II.

THE RIGHT OF APPELLEE TO RECOVER FOR ITS LOSSES DUE TO THE COLLISION WAS AFFECTED BY THE FAULT OF THE "BEAVER", AND RECOVERY SHOULD BE AWARDED UNDER THE CROSS LIABILITY RULE.

Bill of Lading Freight.

The interest of appellee was not in the cargo itself, or with the cargo owner, but in the right to collect from the cargo owner a certain compensation—freight—for the transportation and proper delivery of the cargo. The agency by which this freight would have been earned, but for the collision, was the "Selja", which was mutually in fault with the "Beaver" for the collision.

Possessing, as ships do in the law of the admiralty, a personality, for a ship is as much a party to an action *in rem* as the owner to an action *in personam*, the negligence of the "Selja" was as much a legal fact as that of her master in his negligent direction of her navigation. Had she survived the collision, she would have been libelled and condemned, in accordance with the decision of the Court, with all the attributes, in the eye of the law, of a person. So that, it is very properly said that the "Selja" was the agency of the charterer in its earning of the bill of lading freight, and her negligence thus affects the charterer's rights to that freight just as it does the owner's right to charter hire. In both cases, the ship was the instrumentality through which that which had been lost—freight and hire—would have been earned but for its contributing negligence. The ship thus being negligent, and such negligence contributing to the collision, the charterer's right of recovery is thereby justly brought within the operation of the mutual fault rule.

If the "Selja" was in fault, it was because of the negligence of her master in her navigation. We believe, therefore, that appellee will concede that even if the negligence of the vessel, *per se*, does not affect the right of appellee as charterer to recover for its losses, that of the master does, if he can be said to have been the agent of the charterer.

It is submitted that the master was the agent of the charterer, appellee, in respect to the only interest of the latter which had been damaged by the collision. All that appellee had, or has been deprived of, was a con-

tract to carry the goods, which contract, if completed, would have yielded it a certain freight. To earn the freight appellee was required, *ex necessitate,* to utilize the services of the master in the navigation of the "Selja". The successful performance of that act by the master was the condition precedent to the earning of the interest which was destroyed by the negligent act of the very person through whom it was being earned. This agency of the master, for freight earning purposes, finds express recognition in the provisions of the charter-party.

By its terms, the master was to prosecute his voyage with the utmost despatch and render all customary assistance with the ship's crew, tackle and boats, and at the time of the collision he was actually navigating the "Selja" on a voyage directed by the charterer. The master and officers, though appointed by the owner, were to be solely under the jurisdiction, orders and directions of the charterer as regards employment, agency and other arrangements, and were faithfully to carry out all orders of the charterer in regard to the handling of cargo, as though they received such instructions from the owner. And the charterer, on the other hand, was to indemnify the owner from the consequences or liabilities that might arise from the master signing bills of lading, or otherwise complying with the same. Nothing could be plainer from such provisions than that the master of the "Selja' was, so far as concerned her use, as an instrumentality of the appellee for the earning of the bill of lading freight, an agent of the latter.

Whether, therefore, the navigation of the "Selja"' be viewed as the act of the instrumentality or agency by which appellee was earning its freight, or as the resultant of the negligent direction of her master, the negligence on the part of the "Selja" which contributed to the collision, so far as the "Beaver" was concerned, was the negligence of appellee, and should limit its recovery of bill of lading freight, as against the appellant, to a mutual fault basis.

Bunker Coal, Slings, etc.

Nor is appellee entitled to full recovery for bunker coal, flour slings, house flag, and dunnage wood and mats. These were material parts of the ship's equipment used in the handling and transportation of her cargo and navigation of the vessel to earn the charter hire and bill of lading freight. It is impossible to conceive of a claim for damages more remote than that of a charterer, whose coal furnished the motive power of a negligently navigated vessel, in asking the separation of the coal from the vessel, so as to relieve the coal from the condemnation meted out to the vessel for negligent navigation made possible only through the use of the coal. But for the coal, as well as the negligence in navigation, the collision would never have occurred.

It is submitted that the coal, flour slings, house flag, and dunnage wood and mats became so integral a part of the "Selja" that it is impossible to now dissect her and her equipment, and say that this part was in fault and that was not, as against the "Beaver". Having become a part of the "Selja" to make her a seaworthy vessel and her voyage possible, a right of recovery for

those items must stand in the same position as the vessel, condemned in mutual fault.

Respectfully submitted,

William Denman,

Ira A. Campbell,

McCutchen, Olney & Willard,

Proctors for Appellant.

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No. 2383

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY (a corporation),
Appellant,

vs.

PORTLAND AND ASIATIC STEAMSHIP COMPANY (a corporation),
Appellee.

BRIEF FOR APPELLEE.

Although the facts in the above case are set out with substantial correctness in appellant's brief, the amount involved is quite large and we prefer to go a little more into detail so that the court may have a more thorough understanding of the matter. We would also like to correct the statement of appellant that this suit was brought against the "Beaver", since it was a suit in personam against the owners of the "Beaver", and the statement in the caption on appeal is a mistake. The case was, however, consolidated for trial with the other suits against the "Beaver", and it was stipulated on appeal that it might be heard and determined on

the same record and a short supplemental record containing the final decree and the appeal papers. The pleadings in the case will be found in Volume IV of the main record in Case No. 2365, pp. 1455-1473; certain stipulated facts on pages 1410-1423, and the opinion of the court on pages 1431-1432. The final decree will be found on pages 6-7 of the supplemental record.

The appellee in this case was the time charterer of the "Selja" and its libel (IV, pp. 1465-1473) may be briefly summarized as follows:

1. Alleges the corporate existence of the parties and appellant's ownership of the "Beaver".

2. That on February 1st, 1909, the owners of the "Selja" chartered her to the libelant for three years and that she was proceeding under said charter at the time of the collision in question. Also that "said " charter party was not a demise of the vessel, but was " a mere contract of affreightment for the carriage of " merchandise and live stock and passengers by the " libelant on board said vessel".

3. That libelant procured to be shipped on board the "Selja" various goods, wares and merchandise and gave bills of lading therefor.

4. "That in and by said bills of lading it was pro-" vided that freight should be paid to libelant for the " carriage aforesaid on said goods, wares and mer-" chandise at certain rates which were the usual and " reasonable rates for the transportation of said goods, " wares and merchandise to said ports of San Fran-" cisco and Portland, and that said freight amounted

"in the aggregate, excluding all prepaid freight, to the
" sum of fourteen thousand and eighty-eight and 36/100
" dollars ($14,088.36), and was payable at the said
" ports of San Francisco and Portland upon the de-
" livery of said goods, wares and merchandise to the
" consignees thereof."

5. Sets out the details as to said goods, wares and merchandise.

6. Alleges the total loss of the "Selja", the aforesaid goods, wares and merchandise and the aforesaid freight.

7. Alleges the facts of the collision and the sole fault of the "Beaver", adding, however:

"Libelant further alleges, however, that the freight interest upon which it seeks a recovery in this libel was an innocent one, and that the aforesaid steamship 'Beaver' is responsible for the loss of said freight irrespective of the question whether the aforesaid steamship 'Selja' was partly in fault or not".

8. Alleges the total loss of the aforesaid freight by reason of the collision.

An amendment was by stipulation added to said libel reading as follows:

"VIIIa.

"And libelant further alleges, by way of amendment
" to its libel herein, as follows:

"That at the time of said collision libelant had on
" board said steamship 'Selja' and was the owner of
" the following articles:

"1170 tons of Bunker Coal of the reasonable value
" of $2.565 a ton and of the total value of $3,001.05; 30
" flour slings of the reasonable value of $5.00 each and
" of the total value of $150.00; one house flag of the
" reasonable value of $3.00, and dunnage mats and
" wood of the reasonable value of $55.00; all of said
" articles being of the total value of $3,209.05."

"That by reason of said collision and the negligence
" of those in charge of the steamship 'Beaver' as afore-
" said, all of said articles were totally lost, and libelant
" has been further damaged by reason of said collision
" in said above mentioned amounts, for which it prays
" full recovery with interest in addition to its recovery
" for freight."

All of the facts set forth in the libel were admitted except the allegations as to the facts concerning the collision, upon which the lower court finally passed by finding both vessels in fault, and also the allegation that libelant's freight interest was an innocent one and, therefore, entitled to recover in full in any event. The appellant did not deny this last allegation but merely alleged ignorance in regard to it.

Upon these facts as so set out and admitted, and upon the additional facts set out in a stipulation entered into between the parties (IV, pp. 1410-1423), depends appellee's right to recover for its lost freight, bunker coal, etc., and the amount of such recovery. It is admitted by the pleadings and in appellant's brief that the value of the bunker coal, flour slings, house flag and dunnage mats and wood was $3,209.05, and that the net

freight after deducting the expenses which would have been incurred to earn the same which were saved by the collision was $10,742.21. Interest was also allowed on these sums from the date of the collision. As the correctness of these amounts is expressly admitted in appellant's brief it will be unnecessary to explain how they were arrived at or to cite cases as to how net freight is to be computed in cases of collision. The only question is, as stated by appellant, that of liability, i. e., whether the damages in question should be allowed without offset or whether, because of the negligence of the ''Selja'', the appellee should only recover half damages against which appellant could offset one-half of the cargo losses, thus preventing any recovery at all. In other words the question is whether appellee stands in the position of a guilty party like the owner and master of the ''Selja'' or of an innocent party like the cargo owners and the ''Selja's'' officers and crew.

Under the pleadings no question is made as to the right of appellee to sue for freight in its character as a charterer, nor is any question in this regard raised in appellant's brief. This right is clearly recognized in the case of *The Okehampton,* XVIII Commercial Cases, Advance Sheets, Part VI, p. 320, but, as no point is made on this subject, we need not discuss it further.

It is also evident that if the ''Selja'' was not at fault in the collision appellee is entitled to its recovery, and none of the questions argued herein need be discussed. Whether the ''Selja'' was so in fault will be determined by this court in Case No. 2365 and we agree with appellant that that cause need not be reargued in this.

Argument.

EVEN ASSUMING THAT THE "SELJA" WAS AT FAULT THE RIGHT OF APPELLEE TO RECOVER ITS LOSSES WAS NOT AFFECTED THEREBY AND THE LOWER COURT'S DECISION THAT RECOVERY SHOULD BE ALLOWED WITHOUT OFFSET IS CORRECT.

We will first deal with appellee's right to recover the value of its bunker coal, flour slings, house flag and dunnage mats and wood. Whatever may be said as to the right to recover the bill of lading freight, we submit that the right to recover in full for these items without any offset is clear. The articles in question were personal property which the charterers had on board the "Selja" at the time of the collision, and we submit that they stand in the same position as the cargo, the property of innocent parties. It is admitted by the pleadings and by appellant's brief that the charter party was a mere contract of affreightment and not a demise of the vessel, the charterers having nothing to do with navigating her or causing the collision. The articles lost were the separate and personal property of the charterers and we can see no plausible reason why there should not be a recovery in full for said articles. Counsel would have the coal made responsible for the collision as a personality because it was used to navigate the vessel, but so are officers and crew so used and they were allowed a full recovery in this case. Moreover, the coal for which we are claiming was *not* used to navigate said vessel but was lost before it could be so used. How the coal not used can be charged with negligence we fail to see. If the coal had

been furnished by a cargo owner, surely it would not have been responsible, and why should it be responsible when furnished by a charterer? We also must entirely dissent from the view that bunker coal, flour slings, dunnage mats and wood and a house flag are integral parts of a ship, especially where those articles are furnished by an innocent charterer.

We now come to the question of the recovery of the chartered freight. As already pointed out, and as emphasized in Judge Bean's opinion, the charterer was an innocent party in this case. "The charter was a " mere contract of affreightment, the vessel remaining " in the possession, control and command of the owner " so far as her navigation was concerned. Her master " and crew were the agents of the owner and not of " the charterer. The charterer had no control over her " navigation, and was in no way responsible for the " negligence which caused the damages." (IV, 1431-1432.)

In *36 Cyc.* 67 it is said:

> "If the charter party lets only the use of the vessel, the owner at the time retaining the command and possession and control over its navigation, the charterer is regarded as a contractor for a designated service, the charter party being a mere contract of affreightment and the duties and responsibilities of the general owner are not changed and the charterer is not clothed with the character or responsibility of ownership."

In *Leary v. United States,* 14 Wall. 607; 20 Law Ed. 756, the court says:

> "In examining the adjudged cases on this subject we find some differences of opinion, especially in

the earlier cases, as to the effect to be given to certain technical terms used in the charter party in determining whether the instrument parts with the entire possession and control of the vessel, but no difference as to the rule of law applicable when the construction is settled. All the cases agree that entire command and possession of the vessel, and consequent control over its navigation, must be surrendered to the charterer before he can be held as special owner for the voyage or other service mentioned. The retention by the general owner of such command, possession and control is incompatible with the existence at the same time of such special ownership in the charterer."

In the case at bar the charterers had no such command, possession and control over the ship, but she was in the command, possession and control of the owners. She was the instrument of the owners and not of the charterers. Had she run into another vessel and not herself been lost, the owners and not the charterers would have been responsible. And if the charterers would not be so responsible, how is it possible that they can be charged with negligence so as to defeat their recovery? The provision that the master and officers are to be under the orders and directions of the charterer as regards employment, agency and other arrangements, on which so much stress is laid, is a provision found in practically all modern time charters.

See

Scrutton on Charter Parties, 5 ed., p. 350;
Carver on Carriage by Sea, 4 ed., p. 893.

It simply means that the charterers shall determine what voyages are to be made, what agents are to be

appointed at the ports of loading and discharge and other similar questions. So also as to the bill of lading clause (same citations). This simply protects the master if he signs bills of lading presented by the charterer in case such bills of lading are in fact incorrect, and also protects the owners if the obligations of the charter are increased by the bills of lading. The transportation of the goods, however, by the ship and master is as agent for the owners and not as the agent for the charterer.

See

Carver, §§ 156, 161a.

In § 156 the learned author says:

> "In effect, then, the contract is with the shipowner; and the master should be regarded as having made it on his behalf, and not on behalf of the charterer. And this is the more consistent view. For if the master is agent for the charterers in giving the bills of lading, his agency ceases at that point; in carrying out the contract he clearly acts as servant of the owner."

These provisions relied on by counsel have been repeatedly passed on in recent cases, which exonerated charterers from responsibility for collisions.

See

The Volund, 181 Fed. 643, 665-6, and cases there cited;

Luckenbach v. Insular Line, 186 Fed. 327.

The charters in both of these cases contained the provisions relied on by counsel. In the first of them the ship was being navigated at the time of the collision by

a supercargo appointed by the charterer. The court says in part at p. 666:

> "Nor can we assent to the proposition, which is earnestly contended for, that under charter parties of this sort there is some joint, two-headed navigation of the vessel which will put both parties in control. The provisions (clauses 8, 10) that the captain shall be under the orders and direction of the charterers as regards employment and other arrangements merely authorize the charterer to designate the safe port, and the berth therein to which the ship shall proceed. How she shall be navigated to get there is a matter entirely within the owner's hands."

In the second case cited the vessel was being towed to her berth by tugs employed by the charterer, yet her navigation was still held to be in charge of the owners. These cases are cited not only to show that the provisions of the charter party relied on by appellant have no bearing on the case, but also to demonstrate the absolute innocence of the charterers.

The main fact, however, admitted by the pleadings and borne out by the charter party itself, is that said charter party was a mere contract of affreightment and not a demise of the vessel. As regards the navigation of the ship, the owners were in complete control, the master was their servant and they were responsible for such navigation. The owners by the charter party simply agreed to ship such goods as the charterer put on board to and from such places as the charterer should direct. The ship was their ship and not that of the charterer. In a sense the ship was the agency by which the freight was earned, but so also the ship was

the agency by which the cargo was carried. The question is not what agency the cargo owner or the charterer employs, whether to transport the goods of the one or earn the freight of the other; but whether the cargo owner and the charterer are innocent parties and suffer a loss through the negligence of another over whom they have no control. It is also quite true that the charterer had to utilize the services of the master in the navigation of the "Selja", but so also would a cargo owner have to utilize such services to have his cargo transported. The master did not thereby become the agent of the charterer in navigating the vessel, as the cases above cited show. There was no "joint, two-headed navigation".

Several analogies may also prove helpful in this case. Prior to the decision in the case of *The Hamilton*, 207 U. S. 398; 52 Law Ed. 264, 270, officers and crews of vessels mutually in fault were held to be affected by the negligence of their own ship, and hence were limited to half damages although without offset (*7 Cyc.*, 382). This rule, however, was overturned in that case and it was held that officers and crews, to whom no personal negligence could be charged, could recover in full despite the fact that their own vessel was in fault, and in the case at bar such full recovery was allowed to the officers and crew of the "Selja". And if this be the law, why should not the innocent charterer stand on the same footing? Counsel's argument that the freight is distinct from the charterer, and should be affected by the negligence of the vessel earning it, would apply equally to the recovery by the of-

ficers and crew of the "Selja", and such argument is thus shown to be a specious one.

Another illustration may prove helpful. When cargo is lost the cargo owner is allowed to add to its cost all prepaid freight (*The Scotland,* 105 U. S. 24), and it will not be disputed that all prepaid freight was allowed to the cargo owners in the cases at bar. Yet, if counsel's contention be sound, prepaid freight should not be allowed because it is earned through the agency of the ship and her master. But the law does allow it and, if the innocent cargo owner recovers his prepaid freight, why should not the equally innocent charterer recover his collectible freight? Had the freight in the case at bar been entirely prepaid the "Beaver" would have been liable for all of it as a part of the damages recoverable by the cargo owners. Why should there be a different rule as to the responsibility of the "Beaver" when the freight is not fully prepaid? Surely whether the freight can be recovered from a vessel which is at fault cannot depend upon whether the freight has been prepaid or not, or upon whether it is the innocent cargo owner or the equally innocent charterer who is seeking recovery. That the "Beaver" is liable to the charterer for the loss of freight is not disputed. The only question is whether the owner of the "Beaver" can offset its damages against the charterer's claim, but every right of setoff necessarily presupposes a right of action against the other party. Had the charterer suffered no loss of freight, as, for example, if the freight had all been prepaid, it would hardly be contended that the owner of the "Beaver" would have

any right of action against the charterer. It follows, therefore, that the owner of the "Beaver" has no right of setoff against the charterer, and hence a full recovery of freight must be allowed.

There is apparently, as pointed out by the lower court, a dearth of authorities bearing squarely on the question here involved, but the case of *In re Lakeland Transportation Co.*, 103 Fed. 328, 336, would seem to be somewhat in point. In that case the owners of one of the two offending vessels sued as trustees for the charterers as well as others, just as Captain Lie in Case No. 2365 sued for his owners, officers and crew. The point was made that the charterers and not the owners were the proper parties to sue for this freight, and on this subject the court uses the following significant language:

> "Libelants made claim for loss of freight on the Florida's cargo pending at the time of the collision, viz. the sum of $1,283.05. The Florida was running under charter to the Lackawanna Transportation Company. The libel enumerates as one of the elements of libelants' damages arising out of the collision the loss of this freight. No objection was made before the commissioner as to libelants' right to recover this sum as trustees for the charterer, nor was any exception filed to the allowance of one-half the sum as part of libelants' damage. It is objected here that libelants bear no such relation to the charter as entitled them to sue for this sum, even as trustees, and that suit therefor should have been brought in the name of the charterer. The litigation has apparently proceeded on the theory that the libelants were entitled to prove this item in the capacity of trustees, and its exclusion at this time would deprive the charterer of redress if the

> appraised value of the Roby were sufficient to pay it after satisfaction of prior claims. The question, however, is not important, as the claim of the charterer is inferior to that of the cargo owner, which will absorb the fund. The charterer had possession and control of the vessel, and was owner pro hac vice; and its servant, the master of the Florida, was guilty of fault for which that steamer was condemned. Thorp v. Hammond, 12 Wall. 408-416, 20 L. Ed. 419. The charterer's claim is therefore of the same class as that of the general owners."

We submit that this is a clear intimation that if in that case the charter had been a mere contract of affreightment and not a demise, which made the charterers owners pro hac vice, the charterers would have been allowed a recovery in full without offset. We, therefore, submit that they are entitled to a recovery in full in this case.

It is well settled in the United States that pending freight is recoverable in a collision case (*Spencer on Marine Collisions*, § 202), and that is all that appellee is claiming here although it has also lost a profitable charter. It is true that if there were no charter the owner could only get half damages for the loss of such freight, just as he could only get half damages for cargo losses if he were the owner of the cargo. In a case like that at bar, however, where the charterer and not the owner owns the bill of lading freight, there seems no reason why, as an innocent party, it should not recover its freight in full just as the innocent cargo owner recovers his cargo losses in full and the innocent officers and crew recover their losses. We know of no

case where a party in no way negligent has been barred of his right of recovery in the case of negligence of another, and the general principle that innocent interests should recover in full, as laid down in *The Chattahoochee,* 173 U. S. 540, seems to us the only logical principle to follow in this case.

Any argument that libelant was negligent, based upon the fact that the "Selja" was negligent, has no foundation in fact and can be maintained only in the event that negligence on the part of the charterer is a legal incident to negligence on the part of the ship. The appellant seeks to reach this conclusion by the personification of the "Selja." The courts have frequently treated ships as having a personality, but after all this is merely a fiction and in no case has the application of the fiction been permitted to work injustice. That a fiction will not be extended so as to deprive a party of a recovery, where without fault he has been injured by the negligence of others, is apparent from the language of Mr. Justice Holmes in *The Eugene F. Moran,* 212 U. S. 472. There two tugs and two scows, in tow of one of the tugs, were in collision and all were held to be at fault. It was urged that the tug and its tow should be considered as one unit for the purpose of assessing the damages. The court, however, held that the damages should be equally divided among the four vessels, and said at p. 474:

> "But after all, a fiction is not a satisfactory ground for taking one man's property to satisfy another man's wrong, and it should not be ex-

> tended. There is a practical line and a difference in degree between a case where the harm is done by the mismanagement of the offending vessel, and that where it is done by the mismanagement of another vessel to which the immediate but innocent instrument of harm is attached."

The court might have held that when a ship was negligent everything connected with it was tainted with negligence, and that the right to recover stood upon the same footing as the right of the ship to recover, but our courts early rejected this view and adopted the rule that innocence of fault in fact should be the test. The proposition was laid down in the most general terms in *The Atlas,* 93 U. S. 302, 319, that,

> "*Parties without fault,* such as shippers and consignees, bear no part of the loss in collision suits, and are entitled to full compensation for the damage which they suffer from the wrongdoers, and they may pursue their remedy in personam, either at common law or in the admiralty, against the wrongdoers or any one or more of them, whether they elect to proceed at law or in the admiralty courts." (Italics ours.)

We submit that the decree should be affirmed.

Dated, San Francisco,
August 28, 1914.

Respectfully submitted,
E. B. McClanahan,
S. H. Derby,
Proctors for Appellee.